Office - Supreme Court, U.S.
FILED
APR 27 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1538 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

MYRON MOSKOVITZ*
2371 Eunice Street
Berkeley, CA 94708
Telephone: 415/524-1626

ZONA SAGE
506 Fifteenth Street, #700
Oakland, CA 94612
Telephone: 415/763-5357

**Counsel of Record*

BEST AVAILABLE COPY

45pp

SUBJECT INDEX

	Page
TABLE OF CASES	ii
THE ORDINANCE INVOLVED	1
THE PROCEEDINGS BELOW	2
ARGUMENT	4
I. APPELLANTS' SHERMAN ACT ARGUMENT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION	4
A. The California Supreme Court Fairly Resolved the Sherman Act Issue	4
B. Because the Record in This Case is So Sparse, This Case is Not a Suitable Vehicle for Resolution of Important Antitrust Issues by This Court	5
C. This is the First Case Wherein a Lower Court Has Decided What Antitrust Standard Should Apply to Municipal Regulations for the General Protection of the Public. This Issue Has Had No Opportunity to "Percolate" through the Lower Courts	7
D. Even If the California Supreme Court's Reasons for Affirming the Trial Court Were Incorrect, Its Ruling Was Correct on Other Grounds	9
1. No Conspiracy Was Present In the Enactment or Enforcement of the Berkeley Ordinance	9
2. Appellants Have Failed to Allege or Prove that the Berkeley Ordinance Imposes a Significant Effect on Interstate Commerce	11
3. California Statutes Contemplate that California Cities May Enact Rent Control Ordinances. Therefore, Berkeley's Enactment of the Ordinance is Exempt from Coverage of the Sherman Antitrust Act	13
E. Summary Affirmance or Dismissal Here Will Have Little or No Precedential Effect on Lower Courts	18
II. APPELLANTS' CLAIM THAT THE BERKELEY ORDINANCE IS CONFISCATORY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION	18
CONCLUSION	21
APPENDICES	
APPENDIX 1: COMPLAINT	A-1
APPENDIX 2: RELEVANT STATUTES INVOLVED	A-2-1

TABLE OF AUTHORITIES

CASES	PAGE(S)
American Tobacco Co. v. *United States,* (1945) 328 U.S. 781	9
Birkenfeld v. *City of Berkeley,* (1976) 17 Cal.3d 129	16, 17
City of Lafayette v. *Louisiana Power & Light Co.,* (1978) 435 U.S. 389	3, 5, 13, 14
Community Communications Co. v. *City of Boulder,* (1982) 455 U.S. 40	3, 4, 5, 14
Copperweld Corp. v. *Independence Tube Corp.,* (1984) ____ U.S. ____, 104 S.Ct. 2731	10
Duke & Company, Inc. v. *Foerster,* (1975) 521 F.2d 1277 (3rd Cir.)	14
E. I. du Pont de Nemours & Co. v. *Train,* (1977) 430 U.S. 112	8
Eastern R.R. Conference v. *Noerr Motor Freight,* (1961) 365 U.S. 127	10
Euclid v. *Ambler Realty Co.,* (1926) 272 U.S. 365	20
Fisher v. *City of Berkeley,* (1984) 37 Cal.3d 644	3, 7
Fusari v. *Steinberg,* (1975) 419 U.S. 379	12
H & B Equipment Co. v. *International Harvester Co.,* (1978) 577 U.S. 239 (5th Cir.)	10
Hadacheck v. *Sebastian,* (1915) 239 U.S. 394	20
Helmsley v. *Borough of Fort Lee,* (1978) 78 N.J. 200, 394 A.2d 65	19, 20
McClain v. *Real Estate Board of New Orleans,* (1980) 444 U.S. 232	11
Monsanto Co. v. *Spray-Rite Service Corp.,* (1984) ____ U.S. ____, 104 S.Ct 1464	9, 11
Niles v. *Boston Rent Control Administrator,* (1978) 374 N.E.2d 296 (Mass.App.)	19
Page v. *Work,* (1961) 290 F.2d 323 (9th Cir.)	12
Parker v. *Brown,* (1942) 317 U.S. 341	4
Penn. Central Transp. Co. v. *New York City,* (1978) 438 U.S. 104	19, 20
Power Comm'n v. *Hope Gas Co.,* (1944) 320 U.S. 591	19
Rasmussen v. *American Dairy Association,* (1973) 472 F.2d 517 (9th Cir.)	13
Rice v. *Alcoholic Bev. etc. Appeals Board,* (1978) 21 Cal.3d 431	10
Rice v. *Norman Williams Co.,* (1982) 458 U.S. 654	9
Sun Valley Disposal Co. v. *Silver State Disposal Co.,* (1969) 420 F.2d 341 (9th Cir.)	12
Town of Hallie v. *City of Eau Claire,* (1985) ____ U.S. ____, 53 U.S. Law Week 4418 (3/27/85)	17
United States v. *Webster,* (1984)	8
Wilson v. *Brown,* (1943) 137 F.2d 348	19, 20

RELEVANT STATUTES INVOLVED

	PAGE(S)
California Government Code §65300	14, A-2-1
California Government Code §65300.7	14, A-2-1
California Government Code §65302(c)	14, A-2-1
California Government Code §65580	15, A-2-1
California Government Code §65581	15, A-2-2
California Government Code §65583	15, A-2-3
California Government Code §65589(b)	16, A-2-5
California Government Code §65589(c)	16, A-2-5
California Health & Safety Code §50202	17, A-2-6
California Health & Safety Code §51852.5(a)	17, A-2-6
California Health & Safety Code §1518	17, A-2-6
Local Government Antitrust Act (1984), 15 U.S.C. §35	5, A-2-7
Sherman Antitrust Act, 15 U.S.C. §§1	9, A-2-9

No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOTION OF APPELLEES TO DISMISS OR AFFIRM

Appellees hereby move the Court to dismiss the appeal, on the ground that the appeal presents no substantial federal question, or to affirm the judgment of the California Supreme Court in this case.

THE ORDINANCE INVOLVED

On June 3, 1980, the electorate of the City of Berkeley, California, enacted an initiative measure called "Measure D," which was entitled "Rent Stabilization and Eviction for Good

Cause Ordinance." A copy of this Ordinance appears at page A-109 of Appellants' Appendix to their Juridictional Statement.

Section 3 of the Ordinance sets out its purpose: to protect tenants from unwarranted rent increases and arbitrary evictions brought on by the city's housing crisis, and to help maintain the diversity of the Berkeley community (i.e., to prevent minority and low-income people from being forced out of Berkeley by high rents).

Section 5 exempts from the ordinance government-owned units, transient units, cooperatives, certain small owner-occupied buildings, and all newly-constructed buildings.

Section 6 provides for a Rent Stabilization Board, made up of nine commissioners. Subsection (q) provides a means of ending rent control if the vacancy rate rises above 5%.

Sections 10 through 12 provide for rent increases. Section 10 says the starting point (or "base rent") is whatever rent the landlord was charging on May 31, 1980. From there, there are two ways in which he may receive permission to increase rents. First, §11 requires the Board annually to consider general, across-the-board rent increases for all landlords, to cover general cost increases. Second, if a particular landlord is not satisfied with the general increase, he may utilize §12 to petition the Board for an additional, individual increase. In ruling on this individual petition, the Board is required to take into account many factors (§12, subsection (c)), but in no event shall it deny a rent increase needed to allow the landlord a 'fair return on investment' (§12, subsection (i)).

Section 15(a) sets out remedies for violations of the rent control provisions of Measure D. Section 18 provides for judicial review of any act of the Board.

THE PROCEEDINGS BELOW

Appellants, a group of Berkeley landlords, filed suit on August 19, 1980, challenging the validity of the Ordinance. A copy of Appellants' complaint appears as Appendix 1 to this motion.

The complaint sets out several grounds on which the Ordinance is alleged to be unconstitutional on its face. (The complaint also states that the Ordinance is unconstitutional in its application, but alleges no facts in support of this conclusion.)

The complaint does *not* claim that the Ordinance is preempted by the Sherman Antitrust Act (15 U.S.C. §1)—even though the complaint was filed more than a year after this Court held that actions of cities are not always exempt from the Sherman Act, in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).[1]

Thus, the complaint alleges no facts which would support a finding that the Ordinance imposes a significant effect on interstate commerce. Also, the complaint alleges no facts which would support a finding that the enactment of the Ordinance was the result of any *conspiracy* to restrain trade. Nor does the complaint allege any facts regarding the extent of any anticompetitive effects of the Ordinance.

On October 10, 1980, the trial court granted Appellees' motion for judgment on the pleadings. Appellants' Appendix, page A-105. This order granted Appellants leave to amend their complaint. Appellants did file an amended complaint on November 6, 1980, but they voluntarily dismissed it on July 10, 1981.

Appellants appealed to the California Court of Appeal, First District, which reversed. The California Supreme Court granted a hearing and affirmed the trial court's ruling, upholding the validity of the Ordinance (except for a part of one provision on burden of proof, which the Court held to be preempted by state law.) *Fisher* v. *City of Berkeley*, 37 Cal.3d 644 (reprinted at Appellants' Appendix A-1).

---

[1] Appellants have claimed that their failure to include such a contention in their complaint should be excused because there is a "home rule" provision in the California Constitution, and—until 1982—they did not realize that such a provision would not satisfy the "state action" exemption. (In 1982, this Court so held in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982)). *Lafayette's* failure to address this issue, however, did not deter the plaintiffs in *Boulder* from raising the issue—prior to this Court's ruling in *Boulder*.

Appellants then filed their Jurisdictional Statement in this Court.

ARGUMENT

I. APPELLANTS' SHERMAN ACT ARGUMENT DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

A. The California Supreme Court Fairly Resolved the Sherman Act Issue

In footnote 20 of its opinion in *Boulder*, this Court made it clear that its holding related *only* to the question of whether cities may invoke a "state action" *exemption* from the Sherman Act, *not* the question of what would constitute an antitrust *violation* by a city.

> We hold today *only* that the *Parker* v. *Brown* exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants. As we said in *City of Lafayette*, '[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, *take on a different complexion when adopted by a local government.*' 435 U.S., at 417, n.48

Community Communications Co. v. *City of Boulder, supra*, 455 U.S. at 56, n.20; emphasis added.

This statement was apparently an attempt to allay the fears expressed in Justice Rehnquist's dissent (joined in by the Chief Justice and Justice O'Connor) that the Court's holding on state action exemption would "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare. . . ." *Id.* at 60.

In its opinion below, the California Supreme Court did *exactly* what was strongly suggested by this Court in its footnote 20 in *Boulder*. The California Supreme Court held that —*assuming* the Ordinance was not protected by state action immunity—the "different complexion" of cities' regulations of business required a different (but *not* non-existent) standard under the *substantive* provisions of the Sherman Act. After an

exhaustive discussion and exploration of this Court's antitrust opinions, the Court stated:

> We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purpose could be achieved as effectively by means that would have a less intrusive effect on federal antitrust policies.

Appellants' Appendix, p. A-2.

Appellants characterize this standard as "a blanket exemption from antitrust requirements for municipal governmental action." (Jurisdictional Statement, p. 16). It is not. It is simply a fair accommodation between two interests recognized by this Court in *Lafayette* and *Boulder:* that cities should not always be exempt from antitrust laws, and that cities' regulations for the protection of the public should not be judged by the same standards which are applied to private businesses.

We submit that the decision of the California Supreme Court was correct and should be summarily affirmed.

B. Because the Record in This Case is So Sparse, This Case is Not a Suitable Vehicle for Resolution of Important Antitrust Issues by This Court

We agree that the question of what substantive antitrust standard applies to non-exempt municipal legislation is an important one. (We note, however, that it is now much less important than it was when *Lafayette* and *Boulder* were decided. This is because of the recent enactment of the Local Government Antitrust Act of 1984, 15 U.S.C. §35, Public Law 98-544, which removed the threat of antitrust damage awards against cities in the future.)

But—where possible—an important question should not be decided in the abstract, without the benefit of a specific factual setting in which the question arises. Here, however, the record fails to provide that setting. There is *no* evidence in the

record regarding any potential anticompetitive effects of the Ordinance. Indeed, the complaint fails even to *allege* such effects.

At page 11, footnote 12, of their Jurisdictional Statement, Appellants claim that a factual inquiry would reveal that the Ordinance has "significant anticompetitive impacts." They assert that this is "clear," and they base this on language quoted from the dissent in the court below. The dissent, however, cites several alleged effects of "rent control": that "rent control" may set rents too low to permit adequate services and facilities, that "rent control" discourages market entry, and that "rent control" has a negative impact on the production of new housing.[2]

But these *general* assertions regarding "rent control" do not necessarily apply to the *specific* ordinance at issue in this case: Berkeley's Measure D. In fact, certain provisions in the Ordinance itself make it highly doubtful that it would have the asserted anticompetitive effects.

Section 10 sets the base rent as the rent established by the landlord (Appellants' Appendix, p. A-122), and §§11 and 12 allow the landlord to increase rents to recover cost increases. Appellants' Appendix at pp. A-123 to A-131. This should be enough to enable the landlord to provide services and facilities on a competitive basis. There is *nothing* in the record which indicates that Berkeley landlords do not compete through such services and facilities to obtain what they see as the most stable, credit-worthy, and well-behaved tenants.

Section 5(i) of the Ordinance exempts all newly constructed rental units from rent stabilization. Appellants' Appendix, p. A-114. This makes it highly doubtful that the Ordinance has discouraged market entry and new housing production. Once again, there is no evidence (or even allegations) in the record regarding this issue.[3]

---

[2] These assertions are *not* universally accepted and are the source of much debate, but we will not continue that debate here.

[3] Appellants also claim, at page 15, footnote 14 of their Jurisdictional Statement, that the Ordinance's exemption of City-owned rental units from its scope enables Berkeley to engage in "predatory activity by the city as a market participant." The record fails to disclose, however, either allegations or evidence of the number of rental units owned by the City whose rents are not already controlled by federal regulations covering subsidized housing.

Appellants proclaim that the outcome of a factual inquiry into these questions would be "clear," but we do not share their confidence. This Court should not be required to resolve important issues on factual speculation instead of a factual record.

Appellants might respond by invoking cases which hold that price-fixing by private businesses almost always has significant anticompetitive effects. But it is *not known* whether the same can be said for municipal regulation of local business activities. Indeed, this question will undoubtedly be one of the key issues this Court will address when it faces (in a proper case) the question of what antitrust standards should apply to cities. By "proper case," we mean a case in which a proper record is made regarding any alleged anticompetitive effects of the specific ordinance under review. The case at bench does not include such a record.

C. This is the First Case Wherein a Lower Court Has Decided What Antitrust Standard Should Apply to Municipal Regulations for the General Protection of the Public. This Issue Has Had No Opportunity to "Percolate" through the Lower Courts.

In its opinion in this case, the California Supreme Court noted that:

> [T]his case forces us to wander off the map and travel cross country without the benefit of trail or compass. Although *Boulder* clearly held municipalities subject to antitrust laws, the court specifically declined to address the issue of the applicability of traditional antitrust rules or standards against which municipal defendants are to be judged.

Appellants' Appendix, p. A-15.

To our knowledge, the map includes no signposts from other state or federal courts which might have helped the Court in its quest. No case has come to our attention—before or after the California Supreme Court's opinion—which addresses the issue ruled upon by the California Supreme Court.

Many cases have explored the question of when cities may qualify for state action exemption under *Lafayette* and *Boulder*, yet none but the opinion below has gone past the exemption issue to the matter of substantive standards.

Thus, the intellectual input available to this Court on a very difficult issue is presently quite limited. Not enough time has passed to allow cases on this issue to rise to the intermediate appellate level (or, apparently, even the federal district court level). No "percolation" of the issue through the courts has yet occurred.

The value of such percolation was discussed in a recent article:

> *It is no accident that Justices with widely differing views of the Court's proper role in the American system of government have lauded the values of percolation in both constitutional and statutory cases.* Indeed early in 1984 all members of the Court joined in an opinion[4] rejecting a rule that would have allowed nonmutual collateral estoppel against the federal government on the ground that '[a]llowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeal to explore a difficult question before [the Supreme] Court grants certiori.'

Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 Hastings Constitutional Law Quarterly 375, 406 (1984); emphasis added.[5]

The Court should defer consideration of the issue raised by Appellants until more lower courts (and commentators) have had a chance to struggle with this thorny problem.

---

[4] *United States* v. *Webster*, ____ U.S. ____, 104 S.Ct. 568, 572 (1984).

[5] The author also observed that

> [i]t is particularly important to note that in the Justice's eyes the value of the process is not limited to constitutional cases: 'This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.' *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, at 136, n.26 (1977)

11 Hastings Constitutional Law Quarterly, *supra*, at 406, n.135.

D. Even If the California Supreme Court's Reasons for Affirming the Trial Court Were Incorrect, Its Ruling was Correct on Other Grounds

"In general, an appellee may urge any argument in support of the judgment in his favor, whether or not that argument was accepted by the court below. . . ." Stern & Gressman, *Supreme Court Practice*, p. 537 (5th Ed., 1978).

In this case, there are *several* arguments which support the California Supreme Court's judgment affirming the trial court's judgment on the pleadings. Each of these arguments was presented to the California Supreme Court, but that Court felt it unnecessary to address them, because the trial court judgment should be affirmed on the basis that the Ordinance did not constitute an unreasonable restraint on trade. Appellants' Appendix, pp. A-12 to A-15.

1. No Conspiracy was Present In the Enactment or Enforcement of the Berkeley Ordinance.

For conduct to violate § 1 of the Sherman Act, such conduct must constitute a "contract, combination...or conspiracy."

> [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy' between the manufacturer and other distributors in order to establish a violation. 15 U.S.C. §1. Independent action is not proscribed.

Monsanto Co. v. *Spray-Rite Service Corp.*, ____ U.S. ____, 104 S.Ct. 1464, 1469 (1984).[6]

---

[6] Appellants have argued that they need not show a conspiracy where they seek no damages, but only to have an ordinance declared preempted by the Sherman Act. But this Court has held that such preemption occurs only if a state law involves "a violation of the antitrust laws." *Rice* v. *Norman Williams Co.*, 458 U.S. 654, at 661 (1982). There can be no violation of §1 of the Sherman Act without a conspiracy. Appellants have also argued that the Ordinance makes the City of Berkeley a monopolist under §2 of the Sherman Act, which does not require a conspiracy. But one must be a *competitor* in the relevant market to be a monopolist. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1945). There are no allegations of facts in Appellants' complaint showing that the City of Berkeley is a significant competitor in Berkeley's rental housing market.

In the case at bench, the complaint alleges merely that the Ordinance was enacted by the City of Berkeley, through its electorate, i.e., by unilateral action. It is not alleged that the City conspired with anyone to enact the Ordinance. Even if there were a group of voters or supporters of the proposed Ordinance working among themselves or with the City to secure the enactment of the Ordinance, such combinations would not violate the Sherman Act, as "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Eastern R.R. Conference* v. *Noerr Motor Freight*, 365 U.S. 127, at 135 (1961).

Nor could any illegal conspiracy exist between the City of Berkeley and the other two Defendants named in the complaint—the Berkeley City Council and the Berkeley Rent Stabilization Board. These bodies are merely administrative units within the City's governmental structure. They are like unincorporated divisions of a corporation, which are not considered separate entities for conspiracy purposes. *H & B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978). Even if these bodies had been separately incorporated, they still would be legally incapable of conspiring with their "parent corporation"—the City of Berkeley. *Copperweld Corp.* v. *Independence Tube Corp.*, ____U.S.____, 104 S.Ct. 2731 (1984).

Before the California Supreme Court, Appellants also argued that the Rent Board would conspire *with landlords* by compelling them to limit their rent increases. But the cases relied upon by Appellants all involved conspiracies between *private* parties—producers and retailers—which a statute has compelled or authorized. *None* of these cases held that there is a conspiracy between the *government agency* (which is not a producer and has no commercial interest in the matter regulated) and one of the private parties. *See, e.g., Rice* v. *Alcoholic Bev. etc. Appeals Board*, 21 Cal.3d 431 (1978).[7]

---

[7] An amicus who appeared before the California Supreme Court—the California Apartment Association—claimed that the Ordinance created a conspiracy between the Rent Board and *tenants*, in that the Ordinance requires the Board to hear petitions filed by tenants regarding illegal rent increases and the like. But we are aware of no case holding or implying that a

(Footnote continued on following page)

2. Appellants Have Failed to Allege or Prove that the Berkeley Ordinance Imposes a Significant Effect on Interstate Commerce

Appellants' complaint contains no allegations of facts which would show that the Ordinance significantly affects interstate commerce. Such allegations are *essential* to state a cause of action under the Sherman Act. *McClain* v. *Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980).

Instead, Appellants now rely on a bold assertion that "it is without question" that "the rental housing industry" significantly affects interstate commerce, because "the rental housing industry" is "intertwined" with "interstate finance, construction and materials industries and the interstate movement of people and business." Jurisdictional Statement, p. 9, n.11. Such general contentions, however, probably would not have satisfied this Court's requirements even if they had appeared in Appellants' complaint.[8]

(Footnote continued from preceding page)

citizen's assertion of rights or "cooperation" under an otherwise valid law creates a conspiracy (legal or illegal) between the citizen and the government agency responsible for enforcing the law. In *Monsanto Co.* v. *Spray-Rite Corp., supra*, ____ U.S. ____, 104 S.Ct. 1464, this Court specifically refused to hold that a manufacturer's response (terminating a distributor) to complaints from competing distributors constituted a conspiracy under §1 of the Sherman Act because "[p]ermitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id.* at 1470. Here, likewise, a conspiracy between the Rent Board and tenants cannot be inferred merely from the fact that the Ordinance provides procedures by which tenants may complain to the Rent Board and the fact that the Rent Board responds to such complaints. If the Ordinance is otherwise lawful, a holding that such a conspiracy existed "could deter or penalize perfectly legitimate conduct." *Id.* at 1470.

[8] "Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the Defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce."

McClain v. *Real Estate Bd. of New Orleans, supra*, 444 U.S. at 242.

In any event, it is far from clear that Appellants could have proved that the Ordinance imposes any significant effect on "interstate finance, construction and materials industries and the interstate movement of people and business." The Ordinance, at §5(b), specifically exempts from its coverage housing units in hotels and motels, which might be used by interstate travelers. Appellants rely on an alleged effect of the Ordinance on "interstate financing" of the construction of apartment houses, but §5(i) of the Ordinance exempts new construction from its coverage. *If* it were shown that interstate lenders feared that Berkeley would enact *new* legislation imposing rent control on new construction, such fears would *not* be caused by the Ordinance itself, but by whatever real or imagined economic and social forces in the community which might cause the enactment of such new legislation.

Even if the Ordinance had some effect on interstate financing, it is questionable whether an effect on only one aspect of rental housing would constitute a "significant effect" on interstate commerce, when virtually every other aspect of rental housing in Berkeley is purely local. The rental units themselves are all located within the community. The tenant market—residents of Berkeley and other nearby communities—is almost entirely local. The amenities of each unit which are due to its location (proximity to schools, jobs, transportation, etc.) are purely local. The utilities (heat, water, electricity, etc.) are local. Repairs are performed by local personnel. Management companies are locally based. Where a local activity has only a few aspects which involve interstate commerce, the cases hold that this does not constitute a significant effect on interstate commerce under the Sherman Act. *See Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969) (fact that garbage cans moved in interstate commerce did not mean that local garbage collection services had significant effect on interstate commerce); *Page* v. *Work*, 290 F.2d 323 (9th Cir. 1961) (fact that newspaper used supplies moving in interstate commerce did not mean that legal advertising in newspaper had significant effect on interstate

commerce). *Compare Rasmussen* v. *American Dairy Association,* 472 F.2d 517, 526-528 (9th Cir. 1973) (where *all* of milk products' significant ingredients derived from a line of interstate commerce, effect was sufficient to establish jurisdiction under the Sherman Act).

Because Appellants failed to allege facts showing any significant effect on interstate commerce—even after the trial court allowed them to amend their complaint—the California Supreme Court's judgment that Appellants had failed to allege a violation of the Sherman Act was correct.

3. California Statutes Contemplate that California Cities May Enact Rent Control Ordinances. Therefore, Berkeley's Enactment of the Ordinance is Exempt from Coverage of the Sherman Antitrust Act

In *City of Lafayette* v. *Louisiana Power & Light Co., supra,* this Court held that a city possesses "state action" immunity from antitrust actions where "the State authorized or directed a given municipality to act as it did." 435 U.S. at 414. The Court made it clear, however, that the city need not point to statutes expressly describing the city's power to undertake the specific action which is challenged:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate in a particular area, *that the legislature contemplated the kind of action complained of.*'

Id. at 415; emphasis added.[9]

[9] Professor Areeda explains the rule thusly:

> "*Lafayette* does not require that governmental acts be 'compelled' or 'supervised' by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws. Unfortunately, state statutes seldom speak with clarity on either matter. In practice, therefore, express statements of authority or intent cannot be required. The Supreme Court has found it sufficient that 'the

(Footnote continued on following page)

In *Community Communications Co.* v. *City of Boulder, supra,* 455 U.S. 40, this Court held that a general "home rule" provision in state law does *not* show that "the legislature contemplated the kind of action complained of." (quoting *City of Lafayette* v. *Louisiana Power & Light Co., supra,* 435 U.S. 389.) "A state that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Community Communications Co.* v. *City of Boulder, supra,* 455 U.S. at 56.

The State of California, however, does *not* allow cities to "do as they please" regarding housing. The State *compels* our cities to take measures to expand housing opportunities for all citizens, and it contemplates that rent control may be one of the measures adopted to further this policy.

California Government Code §65300 mandates that every California city shall adopt a general plan.

The legislature recognized, however, that cities should have the discretion to decide which measures would best carry out the general plan in each locality.

Cal. Govt. Code §65300.7 provides that: "The Legislature finds that the diversity of the state's communities and their residents requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances while meeting its minimum requirements."

Cal. Govt. Code §65302(c) provides that every general plan shall include "a housing element."

(Footnote continued from preceding page)

> legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be inferred if the challenged restraint or competition is a necessary or reasonable consequence of engaging in the authorized activity."
>
> Areeda, *Antitrust Immunity for "State Action" After Lafayette,* (1981) 95 Harv.L.Rev. 435, at 445-446. *See, also, Duke & Company, Inc.* v. *Foerster,* 521 F.2d 1277, 1280 (3d Cir. 1975) (state's intent to permit restraint of competition "may be demonstrated by explicit language in state statutes *or may be inferred from the nature of the powers and duties given to a particular governmental entity.*" (Emphasis added.)

There are several statutes dealing specifically with the housing element.

Cal. Govt. Code §65580 provides, in part:

* * *

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing *to make adequate provision for the housing needs of all economic segments of the community.* (Emphasis added.)

Cal. Govt. Code §65581 provides, in part:

> It is the intent of the Legislature in enacting this article:
>
> * * *
>
> (c) *To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal,* provided such a determination is compatible with the state housing goal and regional housing needs. (Emphasis added.)

Cal. Govt. Code §65583 provides, in part:

> The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, *and shall make adequate provision for the existing and projected needs of all economic segments of the community.* (Emphasis added.)

It is apparent from these statutes that the Legislature has required each California city to take measures to improve the housing situations of "all economic segments of the community," and that the Legislature has contemplated that the cities themselves will decide what specific measures will best "accomodate local conditions and circumstances."

The California Legislature has expressed great concern for the housing needs of all economic levels of each community, and the State has left cities with a range of options concerning how best to provide for these needs. Reason able rent control ordinances have been among these options since the California Supreme Court's decision in *Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129 (1976).

The statutes which require cities to prepare and carry out housing elements were not intended to grant new powers to cities or take away powers which cities already have; these statutes merely require cities to utilize whatever *existing* powers they have and *focus* them in such a way as to try to meet the housing needs of all economic segments of the community. This intent is shown by Cal. Govt. Code §65589, subsections (b) and (c):

> (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.
>
> (c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

Subsection (b) shows that the Legislature contemplated that rent control might be one of the measures adopted by cities to fulfill their housing element duties. This provision, enacted in 1980, recognizes that the *grant* of authority for cities to enact rent control comes not from the Legislature but from the state Constitution, Article XI, section 7 (as was held in 1976 in *Birkenfeld, supra,* 17 Cal.3d at 140), and that the *repeal* of such authority can therefore come only from the electorate, not the Legislature.

The Legislature has enacted several other statutes which contemplate that cities may choose to adopt rent control. The Legislature has specifically exempted several state-supervised programs from local rent controls, including the California

Housing Finance Agency program (*see* California Health & Safety Code §50202), state mortgage insurance (*see* California Health & Safety Code §51852.5(a)), and licensed community care facilities (*see* California Health & Safety Code §1518(b)).

It should be noted that there has been *no reason* for the California Legislature to do *more* than "contemplate" that California cities might enact rent control ordinances. In 1976, the California Supreme Court held that cities' powers to enact rent control stem from the state Constitution, not the Legislature. *Birkenfeld, supra,* 17 Cal.3d 129. As the Legislature has been powerless to expand or repeal the authority of cities to enact rent control laws, any legislative attempts to "authorize" or "mandate" rent control ordinances would have been meaningless gestures. *Lafayette* and *Boulder* require only that the Legislature "contemplate the kind of action" taken by the city, and this has happened in the case at bench.

Measure D was enacted by the City of Berkeley in order to fulfill Berkeley's state-mandated obligation to carry out a housing element which makes adequate provision for all economic segments of the community. The Ordinance itself expressly acknowledges this, in §§2(a) and 3.

In its recent decision in *Town of Hallie* v. *City of Eau Clair,* ____ U.S. ____, 53 U.S. Law Week 4418 (3/27/85), this Court held that when a city's action is a "foreseeable result" of state enabling statutes, that is sufficient to show that the state "contemplated the kind of action complained of."

In California, reasonable rent stabilization ordinances[10] are foreseeable results of our legislature's *requirements*[11] that our cities and counties provide for the housing needs of all economic segments of the community. The California Legislature has thereby "contemplated the kind of action" which the

[10] About 50 California communities have some form of rent regulation ordinance, ranging from large cities such as Los Angeles and San Francisco down to small towns which regulate rents for spaces in mobilehome parks.

[11] Note that in *Town of Hallie,* the Wisconsin legislation was merely *permissive,* not mandatory, and yet this Court held that the state action exemption applied. The Court noted that "compulsion affirmatively expressed may be the best evidence of state policy." 53 U.S. Law Week, *supra,* at 4421.

City of Berkeley took when it enacted Measure D. Therefore, this enactment is immune from attack under the Sherman Act.

Although the California Supreme Court deferred this issue (Appellants' Appendix, p. A-12), its judgment is correct on this ground also.

E. Summary Affirmance or Dismissal Here Will Have Little or No Precedential Effect on Lower Courts

At page 8, footnote 10 of Appellants' Jurisdictional Statement, they claim that "lower courts would be required to consider a summary disposition as binding precedent of this Court." They cite authorities holding that such a summary disposition would be a disposition on the merits.

While a summary disposition might be a ruling "on the merits," what "merits" may have been ruled upon might be far from clear. The Chief Justice has noted: "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached .... Another common response to summary affirmances of three-judge-court judgments is confusion as to what they actually do mean." *Fusari* v. *Steinberg* 419 U.S. 379, at 391-392 (1975).[12]

Here, in addition to the reason given by the California Supreme Court, we have shown three additional reasons why that Court's judgment was correct. Should this Court grant our motion to summarily affirm or dismiss, this Court's ruling will be opaque indeed. No lower court will be able to discern which of the four grounds formed the basis for this Court's ruling. Therefore, no court will be obliged to follow the California Supreme Court's reasoning as an adopted ruling of this Court.

II. APPELLANTS' CLAIM THAT THE BERKELEY ORDINANCE IS CONFISCATORY DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION

Section 11 of the Ordinance provides for annual *general* rent increases for all landlords in the city, based on an estimate

[12] *See, also,* Stern & Gressman, *Supreme Court Practice* p. 332 (5th Ed. 1978): "Just what the Supreme Court *per curiam* dispositions hold often presents a problem for the lower courts. The Justices themselves have noted that such decisions are often 'somewhat opaque.' "

of how much most landlords' costs have risen. Section 12 allows landlords to petition for an *additional* rent increase on an individual basis, and the Rent Board is instructed to consider several factors when reviewing these petitions. However, subsection (i) of §12 grants an additional protection to landlords: "No provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a *fair return on investment.*" (Emphasis added.)

Appellants want more. They claim that the Constitution assures them a fair return on the *market value* of the property.

To our knowledge, however, *every* court which has addressed this issue—including this Court—has held that a return on investment standard is constitutional.

In *Power Comm'n* v. *Hope Gas Co.*, 320 U.S. 591 (1944), this Court expressly allowed a rate of return based upon a company's *investment. Id.* at 603-605. The Court also expressly rejected a contention that fair return on *value* was constitutionally required. "The heart of the matter is that rates cannot be made to depend on 'fair value' when the value of the going enterprise depends on the earnings under whatever rates may be anticipated." *Id.* at 601. Return on investment was also the standard used in *Penn. Central Transp. Co.* v. *New York City*, 438 U.S. 104, 136 (1978).

The circularity problem was also recognized in *Wilson* v. *Brown*, 137 F.2d 348 (1943), a case involving rent control: "The use of market value as a test is inconsistent with the regulation of rents, because the value of the property on the market depends in large measure upon its earnings and inflated rents result in inflated market values." *Id.* at 353. *See, also, Niles* v. *Boston Rent Control Administrator*, 374 N.E.2d 296, 301 (Mass.App. 1978); *Helmsley* v. *Borough* of Fort Lee, 78 N.J. 200, 394 A.2d 65, 72 (1978).

Appellants contend that the circularity problem could be avoided if one allows a fair return on the value as of the date the Ordinance was enacted. Jurisdictional Statement, p. 24. But they suggest no ways of resolving the difficult problems of determining just what the fair market value of a piece of

property is. (These problems were discussed in *Helmsley* v. *Borough of Fort Lee, supra,* 394 A.2d at 72, and *Wilson* v. *Brown, supra,* 137 F.2d at 353.) Determining fair market value at some *earlier* date than the present would be even *more* difficult, more expensive, and less reliable. No case holds that such a standard is constitutionally required.

Appellants contend that the Ordinance confiscates the unliquidated appreciation in the value of their properties. Jurisdictional Statement, p. 22. They appear to concede that this Court has held time and again that reasonable land use regulations which diminish unliquidated appreciation are constitutional.[13] But they attempt to distinguish those cases by saying that they involved only real property, whose value represents only "a mere potentiality or expectancy," while a landlord runs a business whose value "is based on its existing condition, not a future expectancy." But there is no allegation or evidence in the record supporting this latter assertion, and it runs counter to the experience in many communities (including Berkeley), where apartment houses have been sold at prices not justified by existing rents, in the expectation that rents can later be raised. In any event, Appellants cite no authority for their proposed distinction.

As interpreted by the California Supreme Court, the Ordinance allows landlords to increase rents to recover any loss in the purchasing power of their profits caused by inflation. Appellants' Appendix, pp. A-40 to A-43. But Appellants complain that they may secure permission to increase rents on this ground only by utilizing the individual petition procedure set

---

[13] For example, in *Penn. Central Transp. Co.* v. *New York City, supra,* 438 U.S. at 130-131, this Court stated:

> [T]he submission that [plaintiffs] may establish a 'taking' simply by showing that they have denied the ability to exploit a property interest that they heretofore had believed was available for development is simply untenable....
>
> • • •
>
> [T]he decisions sustaining other land use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, (1926) (75% dimunition in value caused by zoning law); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (87½% diminution in value)....

out in §12 of the Ordinance, and they are unhappy with the delay this might involve. Jurisdictional Statement, pp. 25-26. However, as the California Supreme Court explained (Appellants' Appendix, pp. A-46 to A-52), the Ordinance contains more than adequate protections against unreasonable delays—including a 120-day limit on all decisions. Therefore, the Ordinance does *not prevent* the Rent Board from handling petitions expeditiously, so Appellants' *facial* attack on the Ordinance must fail. If and when a landlord shows that there was an unreasonable delay in his or her case, that will be the time to challenge the constitutionality of the Board's *application* of the Ordinance.

CONCLUSION

For any and each of the above-stated reasons, we submit that this Court should dismiss the appeal or affirm the judgment of the California Supreme Court in this case.

Dated: _____ Respectfully submitted,

Myron Moskovitz and
Zona Sage
Attorneys for Appellees

by _____
MYRON MOSKOVITZ*

* *Counsel of Record*

COMPLAINT **APPENDIX 1**

FILED
AUG 19 1980
RENE C. DAVIDSON, County Clerk
By _____
John A. Lazanco, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

ALEXANDRA FISHER, an individual; MARGUERITE JACOBS, an individual; MORT BAKER, an individual; RICHARD LAWHORN, an individual; ANTHONY KERSHAW, an individual and LEVIN-ZEMEL, a corporation; on behalf of themselves and all others similarly situated;

Plaintiffs,

v.

THE CITY OF BERKELEY CITY COUNCIL; THE BERKELEY RENT STABILIZATION BOARD; DOES I through XX, inclusive,

Defendants.

No. 536602-6
COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTIONS; DECLARATORY RELIEF

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiffs RICHARD LAWHORN, MORT BAKER, ALEXANDRA FISHER, and MARGUERITE JACOBS are, and at all times relevant have been, residents and voters of the City of Berkeley,

and the owners of apartment buildings located within that City and rented for residential purposes.

2. Plaintiff ANTHONY KERSHAW is and at all times relevant has been an owner of rental units in the City of Berkeley which are rented for residential purposes. Plaintiff LEVIN-ZEMEL is and at all times relevant has been a California corporation and the owner of an apartment building located in the City of Berkeley and rented for residential purposes.

3. At all times relevant, including within the past year, plaintiffs and each of them have paid taxes in and to the City of Berkeley.

4. Defendant City of Berkeley is a municipal corporation, a public entity and a Charter City, existing under the Constitution and laws of the State of California, located in the County of Alameda.

5. Defendant Berkeley City Council is composed of officers and agents of the City of Berkeley.

6. Defendant Berkeley Rent Stabilization Board is a board of Berkeley citizens created by and pursuant to the adoption of Measure D on the Berkeley municipal ballot for the June 3, 1980 election and appointed by the Berkeley City Council.

7. Plaintiffs lack information and belief as to the true names and capacities of defendants Does I through XX, and for that reason sue said defendants by said fictitious names. When their true names and capacities are ascertained, plaintiffs will amend this complaint by inserting their true names and capacities herein.

8. On November 7, 1978, the electorate of the City of Berkeley passed a Renter Property Tax Relief Ordinance.

9. On November 27, 1979, the Berkeley City Council passed an ordinance establishing a Temporary Rent Stabilization Program, effective until June 30, 1980.

10. On June 3, 1980, a majority (but less than 2/3) of voters in the City of Berkeley authorized to vote thereon and who voted, voted in favor of Measure D on the municipal ballot and thereby adopted and ordinance entitled "Adopting A Rent

Stabilization And Eviction for Good Cause Program", a true and correct copy of which is attached hereto as Exhibit A and incorporated herein by this reference. Said ordinance is hereinafter referred to as the "Ordinance." As a consequence, the Ordinance of its own terms, and without more, has become and is the subject of enforcement as law in the City of Berkeley and various acts and events have occurred and will occur including without limitation the following:

a. Within 30 days of adoption of the Ordinance, members of the Berkeley City Council appointed a Rent Stabilization Board ("the Board") to exercise certain powers and duties as set forth in the Ordinance.

b. The Ordinance and Board require that all landlords file with the Board by September 1, 1980 a rent registration statement for each rental unit covered by the Ordinance. The Board has formulated and issued detailed registration forms which the Ordinance requires owners to completely fill in and file with the Board no later than September 1, 1980.

c. a registration fee of twelve dollars ($12.00) per rental unit must be paid by the Owner to the Board no later than September 1, 1980.

d. Failure to file the registration statement and registration fee will result in imposition of an additional $12.00 penalty charge for each rental unit not registered.

e. After adoption of the Ordinance, it is unlawful to charge rent on a regulated rental unit in an amount greater than the lawful rent due and payable on May 31, 1980 in accordance with the provisions of the Temporary Rent Stabilization Program unless the Board sets a different rent in accordance with sections 11 and 12 of the Ordinance.

f. The Board may grant annual citywide rent increases or decreases based upon changes in costs of utilities, property taxes, and maintenance and operating expenses.

g. The intent of the Ordinance is to restrict the Board to grant rent increases only when the landlord demonstrates it is necessary to provide a landlord with a fair return on investment.

h. Special defenses, conditions precedent, causes of action and burdens of proof will be applicable to unlawful detainer actions, notwithstanding any existing state law or pre-existing agreements of the contracting parties to the contrary.

11. The Ordinance both on its face and in its application violates the Constitutions and laws of the United States and of the State of California. More particularly, the Ordinance:

a. Constitutes a taking of property for public use without just compensation and due process in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 19 of the California Constitution.

b. Constitutes a violation of the right to due process of law in contravention of the Fourteenth Amendment of the United States Constitution and Article I, section 7 of the California Constitution.

c. Constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution and Article I, section 7 and Article IV, section 16 of the California Constitution.

d. Constitutes a violation of the right of privacy of personal affairs in contravention of the Fourth Amendment of the United States Constitution, and Article I, section 1 of the California Constitution.

e. Constitutes an impairment of the obligation of contracts in contravention of Article I, section 10 of the United States Constitution and Article I, section 9 of the California Constitution.

f. Constitutes an attempt to regulate an area preempted by legislation of the State of California.

g. Constitutes an illegal restraint on alienation of real property in violation of legislation and public policy of the State of California.

h. Imposes a tax on the owners of residential rental property in the City of Berkeley in violation of Article XIIIA of the California Constitution.

12. An actual controversy has arisen and now exists between plaintiffs and defendants, and each of them, concerning their respective rights, duties and obligations under and arising out of the Ordinance. Plaintiffs contend that the Ordinance is unconstitutional, unlawful, and invalid on its face and in its operation and are informed and believe and thereupon allege that defendants, and each of them, dispute such contention and contend that the Ordinance is valid and enforceable in all respects.

13. Plaintiffs desire a judicial determination of the validity and enforceability of the Ordinance and the rights, duties and obligations of the parties with respect thereto.

14. Such a declaration is necessary and appropriate at this time in order that plaintiffs may ascertain their rights, duties and obligations under the Ordinance, to avoid great and irreparable injury to the parties, and to avoid a multiplicity of litigation with respect to the validity, enforceability, and meaning and effect of the Ordinance.

SECOND CAUSE OF ACTION

(For Injunction Against Enforcement)

15. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

16. Each of the plaintiffs herein currently leases rental units governed by the Ordinance.

17. The costs of operation of the rental units in Berkeley owned and leased by plaintiff RICHARD LAWHORN are now in excess of the rental income from those units and the "negative cash flow" to plaintiff LAWHORN is three hundred fifty dollars a month. When said units were acquired in 1977 the prevailing rents were such to permit plaintiff LAWHORN to "break even." Current restricted rent levels jeopardize the ability of said plaintiff to make payments on his mortgage loans and not to default on said payments.

18. Plaintiff ALEXANDRA FISHER purchased after January 1, 1980, a building in Berkeley which contains four (4) rental units, one of which she occupies. Plantiff FISHER is

unable with the current restricted rents to "break even" on her property payments and has a "negative cash flow" on said property. Plaintiff FISHER owns no other real property.

19. Plaintiff MARGUERITE JACOBS owns a five (5) unit building in Berkeley which she and her late husband had constructed in 1961 and prior to enactment of the Ordinance in her opinion and that of an appraiser had a fair market value of approximately $150,000. Said building in her opinion and that of an appraiser currently has an estimated fair market value of $117,000 as a result of the Ordinance.

20. Plaintiff LEVIN-ZEMEL, Inc. owns a building in Berkeley which said plaintiff's predecessor had constructed in the 1960's and with respect to which said plaintiff's equity is substantial when compared to a relatively small cash investment.

21. Plaintiff ANTHONY KERSHAW owns buildings in Berkeley which he purchased numerous years ago and has greatly increased the value of through thousands of hours of his own labor and improvements he has made thereon.

22. Absent the relief sought hereby:

a. No rent may be increased except by order of the Rent Control Board.

b. Plaintiffs and others similarly situated who desire to sell their rental units will be forced to sell said units at values greatly below the fair market value of said units prior to enactment of the Ordinance.

c. Many plaintiffs and others similarly situated who are in a "negative cash flow" position will not be able raise their rents sufficiently to reach a "break even" position.

d. From and after the adoption of the Ordinance plaintiffs are precluded from seeking or obtaining recovery of possession of their rental units except on the terms specified by section 13 and 14 of the Ordinance and will be subject to the terms of section15 of the Ordinance.

23. As a consequence of the foregoing, the Ordinance is unconstitutional and its enforcement will cause great and

irreparable injury to the plaintiffs, and each of them for the following reasons:

The rent freeze and restrictive future rent increases will result in a loss of income and revenues for plaintiffs and each of them. Such loss cannot, pursuant to the Ordinance be recouped through future increased rentals. The Ordinance mandates that all future rents be set by the Rent Board, which Board has no power to direct that tenants who had benefitted from frozen rents or rollback rents subsequently remit to the landlord the difference between such rents and the proper adjusted rent subsequently set by the Board. Nor does the Board have the power to subsequently set future rents at a rate which will recoup the lost rental for prior periods and/or from prior tenants nor to remit such amounts from its or the City's funds to injured lessors. The amount of such unrecoverable loss is undeterminable for the reason that the Rent Board need not conduct hearings or set rents until October 31, 1980 and December 31, 1980 respectively. Yet the freeze and other provisions will absent the relief here sought, be in effect at all times from and after the adoption of the Ordinance. In consequence, enforcement of the freeze and rent setting provisions of the Ordinance will constitute a violation of the constitutional guarantees herein enumerated.

THIRD CAUSE OF ACTION

(Injunction Against Waste of Funds)

24. Paragraphs 1 through 13, inclusive, of plaintiffs' First Cause of Action are incorporated herein by this reference.

25. The appointment of Board Members, as well as other actions and events more specifically set forth in the Ordinance, will from the date of adoption and thereafter require the expenditure of funds, time, and effort by the City of Berkeley.

26. In consequence of the foregoing, the individual defendants will, in the absence of the relief here sought, be required and obliged to expend and to authorize the expenditure of funds and property of the City of Berkeley in compliance with the Ordinance.

27. Such expenditures will be illegal and will constitute a waste of public monies for the reason that the Ordinance violates the Constitutions and laws of the United States and of the State of California as more particularly set forth in the First Cause of Action in this Complaint.

FOURTH CAUSE OF ACTION

(Injunction Against Violation of California Enviornmental Quality Act)

28. Paragraphs 1 through 27, inclusive of the Complaint are incorporated herein by this reference.

29. The California Environmental Quality Act (Public Resources Code section 21001, et seq.) requires that an environmental impact report must be prepared and filed prior to the direct undertaking of activities by a public agency, unless the activity is exempt by law.

30. The activities to be undertaken by the Berkeley Rent Stabilization Board pursuant to the Ordinance are not exempt from the requirements of the California Environmental Quality Act.

31. By failing and refusing to prepare and file an environmental impact report with respect to its activities under the Ordinance, the Berkeley Rent Stabilization Board is in violation of the California Environmental Quality Act and the Board's activities in administering the Ordinance must be enjoined.

WHEREFORE, plaintiffs pray:

1. For a declaration that the Ordinance is unconstitutional, invalid, and unenforceable, on its face and/or in its operative effect, and that none of the parties hereto have any right, duty or obligation to comply with the terms or provisions thereof.

2. For a preliminary injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the

provisions of the Ordinance, during the pendency of this action, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 11, 12(c) and (i), 14 and 15.

3. For a permanent injunction enjoining defendants, and each of them, and all those acting by, through, for, on behalf of, in concert with them, or pursuant to any of the provisions of the Ordinance, from authorizing or engaging in, directly or indirectly, the enforcement of the Ordinance in its entirety and/or any of the following provisions of the Ordinance: Sections 4(f), 8, 11, 12, 13, 14 and 15.

4. For a preliminary injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, during the pendency of this action, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance, and particularly, sections 4(f), 11, 12(c) and (i), 14 and 15.

5. For a permanent injunction enjoining the defendants and each of them and all those acting by, through, for, on behalf of, or in concert with them, from authorizing, engaging in or performing, directly or indirectly, the expenditure of funds of the City of Berkeley to enforce, attempt to enforce, or comply with, each, any and/or all of the provisions of the Ordinance.

6. For costs of suit, including reasonable attorneys' fees.

7. For such other and further relief as the court deems just.

Dated: DOBBS & NIELSEN

By _____
JAMES R. PARRINELLO, ESQ.,
Attorneys for Plaintiffs

APPENDIX 2

RELEVANT STATUTES INVOLVED

California Government Code

§ 65300. General plan for development

Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning. *Chartered cities shall adopt general plans which contain the mandatory elements specified in Section 65302.*

§ 65300.7. Legislative finding

The Legislature finds that the diversity of the state's communities and their residents requires planning agencies and legislative bodies to implement this article in ways that accommodate local conditions and circumstances, while meeting its minimum requirements.

(Added by Stats. 1980, c. 837, p. 2617, § 1.)

§ 65302

(c) A housing element as provided in Article 10.6 (commencing with Section 65580).

§ 65580. Legislative finding and declaration

The Legislature finds and declares as follows:

(a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.

(b) The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.

(c) The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government.

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.

(e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.

(Added by Stats.1980, c. 1143, p. 3697, § 3.)

§ 65581. Intent of legislature

It is the intent of the Legislature in enacting this article:

(a) To assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal.

(b) To assure that counties and cities will prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal.

(c) To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.

(d) To ensure that each local government cooperates with other local governments in order to address regional housing needs.

(Added by Stats.1980, c. 1143, p. 3697, § 3.)

§ 65583. Contents of housing element

The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and shall make adequate provision for the existing and projected needs of all economic segments of the community. The element shall contain all of the following:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:

(1) Analysis of population and employment trends and documentation of projections and a quantification of the locality's existing and projected housing needs for all income levels. These existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584.

(2) Analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition.

(3) An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.

(4) Analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures.

(5) Analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, and the cost of construction.

(6) Analysis of any special housing needs, such as those of the handicapped, elderly, large families, farmworkers, * * * families with female heads of households, and families and persons in need of emergency shelter.

(7) Analysis of opportunities for energy conservation with respect to residental development.

(b) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.

It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the identified existing housing needs, but should establish the maximum number of housing units that can be constructed, rehabilitated, and conserved over a five-year time frame.

(c) A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilization of appropriate federal and state financing and subsidy programs when available. In order to make adequate provision for the housing needs of all economic segments of the community, the programs shall do all of the following:

(1) Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing, and mobilehomes, in order to meet the community's housing goals as identified in subdivision (b). *The program may include an identification of adequate sites for emergency housing.*

(2) Assist in the development of adequate housing to meet the needs of low- and moderate-income households.

(3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing.

(4) Conserve and improve the condition of the existing affordable housing stock.

(5) Promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, or color.

The program shall include an identification of the agencies and officials responsible for the implementation of the various actions and the means by which consistency will be achieved with other general plan elements and community goals. The local government shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.

§ 65589. Construction of article

(a) Nothing in this article shall require a city, county, or city and county to do any of the following:

(1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.

(2) Disapprove any residential development which is consistent with the general plan.

(b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

HEALTH AND SAFETY CODE

§ 50202. Construction of division; rent control

Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, *coinsured* or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

§ 51852.5 Rental housing developments; exemptions

Notwithstanding any other provision of law:

(a) Any rental housing development which is financed from mortgages insured pursuant to this chapter shall be exempt from all of the following:

§ 1518. Rent control; exemption

(a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.

(b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

An Act to clarify the application of the Clayton Act to the official of local governments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

Sherman Antitrust Act

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or consipiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one

hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

§ 5. Bringing in additional parties

Whenever it shall appear to the court before which any proceeding under section 4 of this title may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

§ 6. Forfeiture of property in transit

Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this title, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

§ 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

§ 7. "Person" defined

The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.